Petition

81-560

No. _____

Office-Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND THE SUPERIOR COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

Did the courts of the State of Alaska violate Article 6 of the United States Constitution by failing to recognize the Hague Convention of March 18, 1970, relating to the taking of evidence abroad in civil or commercial matters, as the supreme law of the land?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND RULE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	4
I. The Decision Of The Court Below Disregarded The Requirements Of The Hague Convention Of 1970 Concerning The Taking Of Evidence Abroad, In Violation Of The Supremacy Clause Contained In Article 6 Of The United States Constitution	4
II. Dornier's Right To Rely Upon The Hague Convention Of 1965 Can Be Preserved Only Through Immediate Review Of The Decision Below	8
CONCLUSION	12
APPENDIX A	1a
APPENDIX B	3a
APPENDIX C	5a
APPENDIX D	7a
APPENDIX E	9a

TABLE OF AUTHORITIES

CASES:	Page
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) ...	8
Mercantile Nat'l Bank at Dallas v. *C. H. Langdeau Republic Nat'l Bank of Dallas*, 371 U.S. 557 (1963)	8
Rosenblatt v. *American Cyanamid Co.*, 86 S.Ct. 1 (1965) .	9
U.S. v. *Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942)	6
United States v. *First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968)	7

INDEX TO APPENDIX

Page

APPENDIX A

Supreme Court of Alaska, Order, Dated July 27, 1981, in *Dornier, GmbH, a German corporation, Petitioner* v. *Donald E. Elliott, et al., Respondents* 1a

APPENDIX B

Superior Court of the State of Alaska, Fourth Judicial District, Denial of Protective Order, Dated April 27, 1981, in *Donald E. Elliott, et al., Plaintiff,* v. *Dornier, GmbH, et al., Defendants; Avonna L. Sweaney, Plaintiff* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants; Bush Air, Inc., Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants* 3c

APPENDIX C

Superior Court of the State of Alaska, Fourth Judicial District, Order, Dated April 25, 1981, in *Donald E. Elliott, et al., Plaintiff,* v. *Dornier, GmbH, et al., Defendants; Avonna L. Sweaney, Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants; Bush Air, Inc., Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants* 5a

APPENDIX D

Constitutional Provision and Rule 7a

APPENDIX E

Hague Convention of 1970 Relating To The Taking of Evidence Abroad in Civil or Commercial Matters, TIAS 7444, 23 U.S.T. 2557 ..... 9a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND THE SUPERIOR COURT OF THE STATE OF ALASKA

Petitioners, Dornier, GmbH, and Dornier, A.G., respectfully request that a writ of certiorari issue to review the order of the Supreme Court of the State of Alaska dated July 27, 1981, (Appendix A) denying Dornier's petition for review of a decision by the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, denying Dornier's motion for a protective order (Appendix B), and to the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, concerning its order of April 27, 1981, denying petitioner Dornier's motion for a protective order.

OPINIONS BELOW

The relevant opinions are unreported, and are attached as appendices as follows:

Appendix A — Supreme Court of Alaska, Order, Dated July 27, 1981, in *Dornier, GmbH, a German corporation, Petitioner,* v. *Donald E. Elliott, et al., Respondents.*

Appendix B — Superior Court of the State of Alaska, Fourth Judicial District, Denial of Protective Order, Dated April 27, 1981, in *Donald E. Elliott, et al., Plaintiff* v. *Dornier, GmbH, et al., Defendants; Avonna L. Sweaney, Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants; Bush Air, Inc., Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants.*

Appendix C — Superior Court of the State of Alaska, Fourth Judicial District, Order, Dated April 25, 1981, in *Donald E. Elliott, et al., Plaintiff* v. *Dornier, GmbH, et al., Defendants; Avonna L. Sweaney, Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants; Bush Air, Inc., Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants.*

JURISDICTION

The order of the court below was entered on July 27, 1981, by the Supreme Court of Alaska, the highest court in the State of Alaska, upon review of the order of the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, dated April 27, 1981.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The relevant provision of the United States Constitution is Article 6, the Supremacy Clause. The relevant rule of procedure is Rule 34 of the Alaska Rules of Civil Procedure. This provision and rule are set forth in Appendix D.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

This petition seeks review of an order of the Supreme Court of the State of Alaska dated July 27, 1981, denying Dornier's petition for review of a decision by the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, denying Dornier's motion for a protective order, and of the order of the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, dated April 27, 1981, denying Dornier's motion for a protective order.

STATEMENT OF THE CASE

This litigation arises out of an air crash which occurred on April 2, 1978, near Bethel, Alaska. The aircraft involved was a Dornier Skyservant owned by Bush Air, Inc., which is also a party in other actions arising out of the this air crash. Dornier,[1] a defendant in three separate actions, filed motions to dismiss for lack of personal jurisdiction and insufficient service of process in each of the three suits, which suits were subsequently consolidated for purposes of hearing Dornier's preliminary motion.[2]

Petitioner Dornier moved for dismissal in this action on July 11, 1980, based upon contentions that it was not subject to personal jurisdiction in Alaska, and that the plaintiffs had failed to make adequate service of process. Thereafter, on July 16, 1980, respondent Sweaney submitted a request for production of documents. Response to those requests for production was held in abeyance by agreement between counsel in view of the pending motion to dismiss. However, following the court's decision of January 14, 1981, denying Dornier's motion to dismiss on jurisdictional grounds, plaintiff Sweaney notified counsel for Dornier that documents responsive to its production requests should be made available not later than February 27, 1981. That date was later extended to March 6, 1981, through courtesy of plaintiff Sweaney's counsel.

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[1] Petitioner Dornier is a corporation incorporated in the Federal Republic of Germany with principal offices at Friedrichshafen, West Germany. Information relating to its parent, subsidiary, and affiliate corporations for filing in compliance with Supreme Court Rule 28.1 has been requested from Germany, and will be furnished to this court upon receipt.

[2] Dornier has petitioned this court for certiorari with respect to the denial of its motion to dismiss for lack of personal jurisdiction, and that suit is presently pending as File No. 81-34. Dornier has not sought certiorari with respect to the more recent denials by the Superior and Supreme Courts in Alaska relating to its motion to dismiss for insufficiency of service of process, the remaining issues relating thereto being intertwined with the jurisdictional issues already before this court.

On March 6, 1981, defendant Dornier moved for a stay of the discovery against it pending a resolution of Dornier's then pending efforts to obtain review of Judge Cooke's denial of its motion to dismiss for lack of personal jurisdiction, and sought to quash plaintiff Sweaney's requests for production. After briefing and oral argument, the Superior Court for the State of Alaska, Fourth Judicial District at Bethel, denied Dornier's motions, and Dornier proceeded to seek appellate review from the Supreme Court of the State of Alaska via a petition for review filed on May 7, 1981. After further briefing, the Supreme Court of the State of Alaska denied Dornier's petition for review by order dated July 27, 1981. Dornier now seeks certiorari with regard to the refusal of the courts of the State of Alaska to require that discovery against Dornier proceed in accordance with the Hague Convention of 1970 Relating to the Taking of Evidence Abroad.

REASONS FOR GRANTING THE PETITION FOR REVIEW

I. The Decision Of The Court Below Disregarded The Requirements Of The Hague Convention Of 1970 Concerning The Taking Of Evidence Abroad, In Violation Of The Supremacy Clause Contained In Article 6 Of The United States Constitution.

Respondent Sweaney's requests for production of documents, dated July 16, 1980, sought production of a large number of items presently located in the Federal Republic of Germany. The requests specified that those documents were to be produced at the offices of plaintiff Sweaney's counsel in Anchorage, Alaska. In so doing, plaintiff Sweaney assumed that it could rely upon the Alaska Rules of Civil Procedure to compel the alien defendant to participate in the lawsuit as though it were a citizen of the State of Alaska. Dornier is not a citizen of the State of Alaska, nor is it a citizen of the United States. The discovery techniques prescribed by the Alaska Rules of Civil Procedure must, in this case, be subordinated to the discovery

techniques prescribed in the treaties involving the United States of America and the Federal Republic of Germany.

The taking of evidence from petitioner Dornier is governed by a multilateral treaty entitled the "Convention on the Taking of Evidence Abroad in Civil or Commercial Matters," March 18, 1970, 23 U.S.T. 2557, TIAS 2444.[3] That treaty was intended to provide for mutual judicial cooperation in civil and commercial matters between various countries, including the Federal Republic of Germany and the United States of America. The treaty established specific techniques by which documents may be obtained from a foreign party, and, in particular, provided that such evidence will be obtained only through a central authority designated by each contracting state. The document requests submitted by respondent Sweaney pursuant to the Alaska Rules of Civil Procedure are inconsistent with the requirements of the treaty, and to that extent, are ineffective.

The treaty between Germany and the United States governs the means by which evidence may be obtained for use in the United States from a citizen of the Federal Republic of Germany, and disregard of the requirements of this treaty by the courts of the State of Alaska is a violation of Article 6 of the United States Constitution, which provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made,* or which shall be made *under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby,* anything in the constitution or *laws of any state to the contrary notwithstanding.* [Emphasis added.]

The United States of America became bound to the provisions of the treaty concerning the taking of evidence abroad

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[3] See Appendix E.

on October 7, 1972. See 23 U.S.T. 2555, TIAS 7444. Similarly, the document of ratification by the Federal Republic of Germany was deposited with the Ministry for the Foreign Affairs of Netherlands on April 17, 1979, and the treaty became effective with respect to the Federal Republic of Germany on June 26, 1979. The Alaska court, therefore, cannot enforce plaintiff Sweaney's requests for production of documents under the Alaska rules because to do so would violate a valid international treaty. See *U.S.* v. *Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

The decisions of the courts of the State of Alaska have serious international overtones because of their potential impact on relations between the United States and the Federal Republic of Germany. The interpretation of how this international treaty affects the rights of an alien defendant should not be determined at the state court level, but should be considered by this Court so that the federal court system can control the effect of federal treaties.

In this argument below respondent Sweaney has argued that this treaty should not apply because Dornier is a party to the litigation, and because judicial assistance from the German government is not required. The Hague Convention of 1970, however, makes no such distinction. Indeed, the Convention clearly does apply to the production of documents, in view of the provisions of Article 3 relating to the contents of letters of request:

> Where appropriate, the letter shall specify, *inter alia* — . . . (g) the documents or other property, real or personal, to be inspected . . . .

Both the convention on the service of documents abroad and the convention on the taking of evidence abroad are outgrowths of the Hague Convention on Civil Procedure of 1954.[4] Chapter 1 of the convention of 1954 eventually result-

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[4] Phillip W. Amram, "The Proposed Convention on the Taking of Evidence Abroad," *American Bar Association Journal*, July 1959, Volume 55, page 651.

ed in the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents, and Chapter 2 of that convention led to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. The fact that both conventions are outgrowths of the same treaty demonstrates not only the interrelationship of the two, but also the fact that both were intended to govern proceedings involving parties to litigation in a foreign state. Indeed, the convention on the taking of evidence abroad clearly limits itself for use in judicial proceedings.[5]

Respondent Sweaney's requests for production of documents are extremely broad and comprehensive, and seek production of a vast quantity of materials presently located in Dornier's offices in the Federal Republic of Germany. The request is especially burdensome because German law does not provide for this type of extensive pre-trial discovery, and German corporations and attorneys cannot be expected to be familiar with the process. Furthermore, much of the material involved is written in the German language, and cannot readily be reviewed by Dornier's Alaska counsel. Only by reviewing an extensive quantity of materials located in West Germany would it be possible to identify the requested materials, and to be of any utility whatever in this case, documents written in the German language would have to be translated into English. The burden imposed by this process of locating documents, the process of translating the documents, and the numerous conflicts that will undoubtedly result as a consequence of the conflicting translations obtained by various parties too, all add to the oppression engendered by the operation of the Alaska Rules of Civil Procedure with regard to this alien defendant.

Finally, respondent Sweaney below relied upon *United States* v. *First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968) for the proposition that U.S. courts could require parties over

[5] Article 1 provides "A letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated."

whom they had in personam jurisdiction to produce documents in their possession located in foreign countries. Aside from Dornier's contention regarding lack of personal jurisdiction, there are a number of important distinctions that should be noted. In the first place, the defendant in that matter was First National City Bank, one of America's largest banking institutions. The United States District Court for the Southern District of New York had jurisdiction over First National City Bank in all respects, and was not simply exercising jurisdiction obtained via a long arm statute over a nonresident defendant. The United States court in that instance was dealing with a United States citizen, and indeed, U.S. banking institutions such as First National City Bank are closely regulated under banking laws in this country. The situation presented in *U.S.* v. *First Nat'l City Bank* is radically different from the one presented herein, does not involve an alien defendant, and occurred before the Hague Convention of 1970 had been adopted.

II. Dornier's Right To Rely Upon The Hague Convention Of 1965 Can Be Preserved Only Through Immediate Review Of The Decision Below.

Respondent Sweaney will undoubtedly argue here, as it has with regard to Dornier's petition for certiorari relating to the Alaska court's lack of personal jurisdiction over it, that the denial of a petition for review by the Alaska Supreme Court does not constitute a final decision by the courts of the State of Alaska. There have been, however, a number of instances where this court has granted certiorari despite the fact that the litigation below was proceeding. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975). Such instances include cases wherein the federal issue was in effect finally determined by the state courts, despite the continuing litigation. Dornier contends that that situation is presented in this petition.

In *Mercantile Nat'l Bank at Dallas* v. *C. H. Langdeau Republic Nat'l Bank of Dallas,* 371 U.S. 557 (1963), this court per-

mitted appeal in order to determine a venue question in advance of trial on the merits. It was stated, at 558:

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, *we believe that it serves the policy underlying the requirement of finality in 28 U.S.C.* §1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, *to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed* until the conclusion of the proceedings. [Emphasis added.]

The same concern for unnecessary litigation has been voiced by Dornier in both this and its earlier petition.

Concern for litigants who are placed in untenable positions by virtue of on-going lower court proceedings has been voiced before. In *Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1 (1965), Mr. Justice Goldberg argued, at 3:

> . . . [A] litigant should not be forced to take the risk of a default judgment to obtain the benefits which national policy . . . is designed to afford him.

Though Justice Goldberg refused to grant the stay requested in *Rosenblatt*, the concerns expressed therein are equally applicable in the petition submitted by Dornier.

The question presented by this petition is procedural, and has been argued to both the Superior and Supreme Courts of the State of Alaska. The Superior Court has declined to abide by the requirements of the international treaty, and the Supreme Court of Alaska has denied a petition for review. Thus, the procedure to be followed with respect to the trial of this matter in Alaska will be in accordance with the Alaska Rules of Civil Procedure, and in defiance of the Hague Convention of 1970. For all practical purposes, the question has been finally decided in Alaska.

Respondent Sweaney will also undoubtedly contend that the order of the Superior Court is subject to review by the Su-

preme Court of the State of Alaska at the conclusion of litigation. Such review, however, is unavailing because by that point in time Dornier will have been forced to make the impossible decision of proceeding with either of two courses of action. First, Dornier could comply with the order of the courts of the State of Alaska, and undertake the enormous burden of proceeding with discovery as has been ordered. In that event, review of the court's order regarding discovery will have been rendered moot by Dornier's abandonment of the position. Alternatively, Dornier could refuse to abide by Alaska's requirements regarding discovery, and subject itself to the likely sanctions and potential default judgment which could be entered, gambling all of its defenses on the basis of its belief that such discovery is not permitted by virtue of an international treaty.

The chilling effect of such an impossible decision is manifestly apparent, and permits Dornier to rely upon constitutionally mandated protections and international agreements only if it will first run the gauntlet of potential sanctions to be levied upon it. To permit such a course of action to exist is to render meaningless these constitutionally prescribed protections.

The Hague Conventions of 1970 established a mechanism for obtaining discovery from citizens of foreign countries, and has been ratified by both the United States and the Federal Republic of Germany. The burdens and costs inherent in the pre-trial discovery process are well known, and are only magnified when applied to an alien defendant. It is only just and appropriate that the United States government should enter into treaties with foreign countries for the purpose of establishing means by which judicial processes can be accomplished consistently with the protection of citizens of both countries. Yet Dornier is now being told that the plaintiffs can ignore the international law in this area, and compel Dornier to abide by rules of court in the State of Alaska that are inconsistent with a valid international treaty.

This court should accept Dornier's petition for certiorari so that it can consider the potential constitutional implications of the disregard of an international treaty by the courts in the State of Alaska. Review of this matter is also appropriate as a means of correcting the decision of the court below and avoiding the intolerable position in which Dornier has been placed as a consequence of that decision. As matters now stand, Dornier must choose between standing upon its rights as established by the Hague Convention of 1970, which would likely result in the imposition of sanctions for refusal to make discovery, or to bear the burden of complying with an incorrect decision, which would effectively render moot the constitutional questions raised by the disregard of this valid international treaty.

The courts of the State of Alaska have effectively rendered a final decision with regard to the procedure for discovery to be utilized in the trial below, and have directed those proceedings to be conducted in a manner inconsistent with a valid international treaty of the United States. Immediate review is necessary in order to avoid the erosion of the federal policy relating to discovery abroad established by the Hague Convention of 1970, and in order to protect Dornier from the untenable position in which it has been placed by the decisions below.

CONCLUSION

This case presents the court with an opportunity to clarify the state of the law with respect to the scope of discovery permissible against alien litigants, and as delineated by the Hague Convention of 1970. It also permits the court to correct a decision below which erroneously limits the application of federal law, and to insure compliance by the states with the federal government's agreements with foreign nations concerning international judicial relationships.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. 6007
Superior Court Nos. 4BE-79-140 Civil
4BE-80-59 Civil
4BE-80-57 Civil

DORNIER GMBH, a German Corporation,
Petitioner,

v.

DONALD E. ELLIOTT, et al.,
Respondents.

Order

(FILED July 31, 1981)

Before: Rabinowitz, Chief Justice, Connor, Burke, Matthews, and Compton, Justices.

On consideration of the Petition for Review filed May 7, 1981, and the responses to the Petition, filed May 20, 1981, May 21, 1981, and May 28, 1981,

IT IS ORDERED:

The Petition for Review is denied.

Entered by direction of the court at Anchorage, Alaska, on July 27, 1981.

CLERK OF THE SUPREME COURT

/s/ ROBERT D. BACON
Robert D. Bacon

ccs: Justices
Counsel
Honorable Christopher Cooke
Clerk, Bethel

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

No. 4BE-79-140 Civil

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the Estate of SCOTT V. ELLIOTT, Deceased,

Plaintiffs,

v.

DORNIER GMBH, a German corporation, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation,

Defendants.

No. 4BE-80-59 Civil

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS,

Plaintiff,

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC.,

Defendants.

No. 4BE-80-57 Civil

BUSH AIR, INC., an Alaska corporation,

Plaintiff,

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC.,

Defendants.

Protective Order

This matter having come on before the court on the motion of defendant Dornier, and the court having considered the memoranda and arguments submitted by the parties hereto, and being otherwise fully advised on the premises, now, therefore,

IT IS HEREBY ORDERED that the request for production of documents to Dornier from plaintiff Sweaney, dated July 16, 1980, is quashed.

DATED at Bethel, Alaska, this _____ day of _____, 1981.

DENIED

The Honorable Christopher R. Cooke
Judge of the Superior Court

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

No. 4BE-79-140 Civil

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the Estate of SCOTT V. ELLIOTT, Deceased,

Plaintiff,

v.

DORNIER GMBH, a German corporation, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation,

Defendants.

No. 4BE-80-59 Civil

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS,

Plaintiff,

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, INC., KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC.,

Defendants.

No. 4BE-80-57 Civil

BUSH AIR, INC., an Alaska corporation,

Plaintiff,

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC.,

Defendants.

Order

(FILED April 2, 1981)

Defendant Dornier's motion to dismiss for insufficient service of process is denied.

IT IS SO ORDERED.

DATED at Bethel, Alaska this _____ day of April, 1981.

/s/ CHRISTOPHER R. COOKE
Superior Court Judge

APPENDIX D

Constitutional Provision

Article 6 Of United States Constitution

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

RULE OF PROCEDURE

Rule 34 of Alaska Rules of Civil Procedure

CIVIL RULES

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land. (Amended by Supreme Court Order 158 effective February 15, 1973)

APPENDIX E

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERICAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER 1 – THE LETTERS OF REQUEST

ARTICLE 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

ARTICLE 2

A Contracting State shall designate a Centrl Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

ARTICLE 3

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

ARTICLE 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

ARTICLE 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

ARTICLE 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

ARTICLE 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

ARTICLE 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

ARTICLE 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

ARTICLE 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

ARTICLE 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

ARTICLE 12

The execution of a Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

ARTICLE 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

ARTICLE 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the appropriate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II – TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

ARTICLE 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

ARTICLE 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be take under this Article without its prior permission.

ARTICLE 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assist-

ance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

ARTICLE 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia,* as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

ARTICLE 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

ARTICLE 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

ARTICLE 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III – GENERAL CLAUSES

ARTICLE 23

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

ARTICLE 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

ARTICLE 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

ARTICLE 27

The provisions of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

ARTICLE 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from:

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

ARTICLE 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905[1] and the 1st of March 1954,[2] this Convention shall replace Articles 8-16 of the earlier Conventions.

ARTICLE 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

ARTICLE 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

ARTICLE 32

Without prejudice to the provision of Article 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

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[1] 99 *British Foreign and State Papers* 990.

[2] 286 UNTS 265.

ARTICLE 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

ARTICLE 34

A State may at any time withdraw or modify a declaration.

ARTICLE 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursunant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

ARTICLE 36

Any difficulties wich may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

ARTICLE 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

---

[1] TS 993; 59 Stat. 1035.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

ARTICLE 40.

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.[2]

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

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[2] Extended to Guam, Puerto Rico, and the Virgin Islands pursuant to notification sent by the American Embassy at the Hague on Feb. 6, 1913.

ARTICLE 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

ARTICLE 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Convention.

DONE AT THE HAGUE, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

FOR THE FEDERAL REPUBLIC OF GERMANY

(s.) HANS ARNOLD

FOR AUSTRIA,
FOR BELGIUM,
FOR CANADA,
FOR DENMARK,
FOR SPAIN,
FOR THE UNITED STATES OF AMERICA,
FOR FINLAND,
FOR FRANCE,
FOR GREECE,
FOR IRELAND,
FOR ISRAEL,
FOR ITALY,
FOR JAPAN,
FOR LUXEMBOURG,
FOR NORWAY,

(s.) G. ROGSTAD

FOR THE NETHERLANDS,
FOR PORTUGAL,

(s.) CONSTANTINO RIBETRO VAZ

FOR SWEDEN,
FOR SWITZERLAND,
FOR CZECHOSLOVAKIA,
FOR TURKEY,
FOR THE UNITED ARAB REPUBLIC,

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

(s.) EDWARD TOMKINS

17 Apr. 1970

Opposition

Office - Supreme Court, U.S.
FILED
OCT 27 1981
ALEXANDER L. STEVAS
CLERK

No. 81-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND THE SUPERIOR COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT SWEANEY IN OPPOSITION

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QUESTIONS PRESENTED

Does this Court have jurisdiction to review the issue below when the highest court of the State of Alaska has rendered neither decision nor final judgment?

Must a defendant foreign aircraft manufacturer subject to personal jurisdiction in Alaska comply with Alaska's procedural rules regarding discovery that do not conflict with the Hague Convention of 1970?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT

I. The Issue Dornier Seeks To Have Reviewed Lacks Finality And Is Outside The Jurisdictional Requirements of 28 U.S.C. § 1257 Because The Highest Alaska Court Competent To Rule On The Issue Merely Refused To Grant Discretionary Interlocutory Review of a Pre-Trial Discovery Ruling, Did Not Expressly Or Impliedly Address The Applicability Of The Hague Convention And Did Not Foreclose That Issue From Subsequent Review Under Alaska's Procedural Rules 4

II. A Foreign Defendant Subject to Personal Jurisdiction In a State Must Comply With That Jurisdiction's Discovery Rules That Do Not Conflict With The Hague Convention of 1970 7

CONCLUSION 11

APPENDIX 1a

TABLE OF AUTHORITIES

CASES: *Page*

Alexander v. Parsons, 75 F.R.D. 536 (W.D. Mich. 1977) 9

Coopman v. Superior Court, 237 Cal. App. 2d 656, 47 Cal. Rptr. 131 (1965) 8

Costarelli v. Massachusetts, 421 U.S. 193 (1975) (per curiam) 5

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 4, 5, 6

Dornier, GmbH v. Elliott, 50 U.S.L.W. 3222 (U.S. Oct. 5, 1981) 2

Flynt v. Ohio, 101 S. Ct. 1958 (1981) 5

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 6

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 9

Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980) 10

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 4

United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968) 10

Urie v. Thompson, 337 U.S. 163 (1949) 5

Wolff v. Arctic Bowl, Inc., 500 P.2d 758 (Alaska 1977) 5

TREATIES:

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 ..... 7, 8, 9, 10, 11

RULES:

Supreme Court Rule 28.1 ..... 2, 3

Alaska Rule of Civil Procedure 34 7

Alaska Rule of Appellate Procedure 402(b) 2, 4

STATUTES:

28 U.S.C. § 1257 ..... 2, 4

OTHER AUTHORITIES:

Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651 (July 1969) 8

Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L.Q. 646 (July 1969) 8

VIII Martindale-Hubbell Law Directory (1981) 7

Stein, *Depositions in Foreign Jurisdictions: "Innocence Abroad,"* 7 Litigation 14 (Spring 1981) 10

No. 81-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DORNIER, A. G., and DORNIER, GMBH, *Petitioners*,

v.

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND THE SUPERIOR COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT SWEANEY IN OPPOSITION

OPINIONS BELOW

Respondent Sweaney adopts the description of the opinions below set forth at pages 1 through 2 and in the Appendix of the Petition for Certiorari, but notes that the order set forth in Petitioner's Appendix C is not relevant to the issues before the Court.

JURISDICTION

The order of the Supreme Court of Alaska which Petitioners request this Court to review was entered on July 27, 1981. The order of the trial court was entered on April 27, 1981. Neither order is a "final judgment or decree" within the meaning of 28 U.S.C. § 1257. The highest court of the State of Alaska has not yet rendered a decision on the issue presented by Petitioners. Dornier is still entitled to an appeal as of right to the state supreme court. Accordingly this Court lacks jurisdiction. This deficiency is analyzed *infra* at pages 4 to 6.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the provisions and statutes cited in the Petition, the following relevant provisions are set forth in pertinent part in the Appendix hereto: 28 U.S.C. § 1257(3); Supreme Court Rule 28.1; Alaska Rule of Appellate Procedure 402.

STATEMENT OF THE CASE

This is the second petition for certiorari by Dornier, A.G. and Dornier, GmbH ("Dornier") in this action.[1] The underlying litigation is based on the crash near Bethel, Alaska, of a Skyservant aircraft designed, manufactured and sold by Dornier. Respondent Sweaney's decedent, Gary Roberts, died in that crash.

The issue of personal jurisdiction over Dornier by the Alaska courts was the subject of lengthy early skirmishing below, as well as the earlier petition for certiorari to this Court. Just

[1] Dornier earlier petitioned this Court for review by certiorari of certain orders regarding personal jurisdiction. That petition was recently denied. Dornier, GmbH v. Elliott, 50 U.S.L.W. 3222 (U.S. Oct. 5, 1981).

over a year after the action was instituted by Sweaney, Alaskan counsel for Dornier was served with a request for production of documents. By agreement of counsel, Dornier was excused from responding to those requests until the personal jurisdiction motions were decided.

After the Alaska trial court denied Dornier's motion to dismiss for lack of personal jurisdiction on January 14, 1981, Sweaney renewed the requests and directed compliance by February 27, 1981. As a courtesy to Dornier's counsel, the date was later extended to March 6. Dornier again failed to respond and instead filed a motion to stay discovery pending its efforts to persuade the Alaska Supreme Court to grant interlocutory review of the personal jurisdiction ruling. It also moved to quash Sweaney's production requests. After the motions were briefed and argued, they were denied by the superior court on April 27, 1981.

Dornier then petitioned the Alaska Supreme Court for discretionary review. The petition was denied by order dated July 27, 1981 without any expression of opinion on the merits. Dornier filed this Petition for Certiorari on September 18, 1981, requesting review of both the Alaska Supreme Court's denial of discretionary interlocutory review and the state superior court's failure to quash Sweaney's document requests.[2]

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[2] Dornier continues to avoid compliance with Supreme Court Rule 28.1, which requires a listing of its parent, subsidiary and affiliate corporations. Dornier has been aware of this requirement since at least July 24, 1981, when Respondent Sweaney's previous opposition brief was filed pointing out this failing. Dornier states in its present Petition that the information "has been requested from Germany, and will be furnished to this court upon receipt" (Petition at 3 n.1), but neglects to explain why it has failed to obtain that information for nearly three months.

REASONS FOR DENYING THE WRIT

I. The Issue Dornier Seeks To Have Reviewed Lacks Finality And Is Outside The Jurisdictional Requirements of 28 U.S.C. § 1257 Because The Highest Alaska Court Competent To Rule On The Issue Merely Refused To Grant Discretionary Interlocutory Review of a Pre-Trial Discovery Ruling, Did Not Expressly Or Impliedly Address The Applicability Of The Hague Convention And Did Not Foreclose That Issue From Subsequent Review Under Alaska's Procedural Rules.

The Court's appellate jurisdiction is generally limited by 28 U.S.C. § 1257 to a final judgment "rendered by the highest court of a State in which a decision could be had." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975). The reasons for this rule include not only judicial efficiency but also the "potential conflict between the courts of two different governments." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Id.* Four exceptions to the final judgment requirement have evolved, whereby the Court may review the highest possible state court's decision on the merits in the absence of a final judgment. *Cox, supra*, 420 U.S. at 477. The orders challenged by Dornier do not qualify under any of those exceptions.

A threshold requirement of all four *Cox* exceptions is a final pronouncement on the federal issue by the highest possible state court. *Id.* Dornier cannot take comfort in any of the four categories because this threshold requirement has not been met. The Supreme Court of Alaska has not decided the discovery issue or issued a ruling final in either form or substance. A petition for review merely requests the supreme court to exercise its discretion to undertake early review of an issue. Alaska Rule of Appellate Procedure 402(b). Denial of the petition neither expresses an opinion on the merits nor precludes Dornier from subsequent review of the issue through

normal appellate channels. Dornier in effect asks this Court to rule that the Supreme Court of Alaska improperly failed to exercise its discretion in favor of special interlocutory review. When discretionary review is denied, but the right exists to apply to the state court for further review, a writ of certiorari is inappropriate. *Costarelli v. Massachusetts*, 421 U.S. 193 (1975) (per curiam).

A second overriding factor in all the *Cox* exceptions is the absence of any other federal issues to be resolved. In footnote 2 of its Petition, Dornier refers to its earlier petition for certiorari on the personal jurisdiction issue. Although that petition was denied, Dornier is not precluded from raising that federal issue again on a later appeal of right to the Alaska Supreme Court, or on later petition to this Court. *See Urie v. Thompson*, 337 U.S. 163, 171-72 (1949); *Wolff v. Arctic Bowl, Inc.*, 500 P.2d 758, 763 (Alaska 1977). The possibility of piecemeal review of another federal issue is a strong reason to deny certiorari. *Flynt v. Ohio*, 101 S. Ct. 1958, 1959-60 (1981); *Cox, supra*, 420 U.S. at 477.

Moreover, even if Dornier were to satisfy the threshold requirements of *Cox*, it does not fall within any of its four specific categories. The first category involves cases where there will be further proceedings below but the federal issue preordains the result, so that there is "nothing more to be decided." *Cox, supra*, 420 U.S. at 479. The example cited by Justice White involved a criminal defendant in a case remanded for jury trial. The defendant admittedly had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground. Dornier clearly cannot come within this category. There will be a trial, which Dornier may win, regardless of the outcome of this discovery question.

In the second category, the federal issue as finally decided by the state's highest court "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. For example, a federal question resolved by a state court decision ordering a transfer of property, and remanding for an accounting, would survive the accounting and require

Supreme Court review. *Id.* That is not the case here. If Dornier prevails on the merits of its defense at trial, the issue presented by its current Petition will be moot.

In the third *Cox* type of case, there exists no possibility of later review, regardless of the outcome of the state proceedings. *Id.* at 481. This situation requires two concurrent factors. If the complaining party wins on other grounds, the issue would be moot; if he loses, state law would prevent him from seeking review. Illustrative cases cited in *Cox* involved state statutes precluding any appeal, as by the state after a criminal acquittal. Dornier cannot come within this category, since it has the right to raise the issue on later appeal.

The final category perceived in *Cox* also arises where the party could win in later proceedings on a nonfederal ground thereby making Supreme Court review unnecessary. To come within this exception, two additional requirements must be satisfied. First, reversal on the federal issue would preclude further proceedings, not merely control their nature or the taking of evidence. Secondly, without immediate review federal policy might be seriously eroded. *Id.* at 482-83. Both factors must be present, as was the case in Justice White's example, *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963). Dornier's attempt to rely on that case is misplaced. Unlike *Langdeau*, favorable disposition of Dornier's discovery motion would not totally preclude further proceedings below. Consequently, it fails to come within this category.

Thus, Dornier fails to come within any of the exceptions to the finality rule set forth in the *Cox* opinion. Indeed, the Supreme Court of Alaska has not rendered a decision or in any way addressed the merits of the discovery issue. It has merely denied discretionary interlocutory review. The Petition must be denied due to lack of finality and this Court's resultant lack of jurisdiction.

II. A Foreign Defendant Subject to Personal Jurisdiction In a State Must Comply With That Jurisdiction's Discovery Rules That Do Not Conflict With The Hague Convention of 1970.

Dornier originally argued that it should not be required to produce the documents required by Sweaney only because production would be "burdensome and inconvenient . . . and would require review of a significant quantity of documents." It continues briefly to urge that ground for relief but relies primarily upon the Hague Convention on the Taking of Evidence Abroad, which it raised for the first time below in its reply to Sweaney's opposition to the motion to quash Sweaney's document requests. In effect, Dornier seeks to ignore the law of a state which has jurisdiction over it. It implies that Sweaney and the Alaska court are treating it as if it were a state resident. To the contrary, Dornier is being subjected to the same burden as any other foreign manufacturer subject to personal jurisdiction from whom Civil Rule 34 production is sought.

Certainly, where some provision of Alaska law conflicts with the terms of a treaty to which the United States is a party, the terms of the treaty would control. The Convention and the Alaska rules on discovery are not, however, in conflict either expressly or impliedly.

The Convention was ratified by the United States on August 8, 1972 and became effective October 7, 1972. 23 U.S.T. 2555, T.I.A.S. No. 7444. It was signed by West Germany on March 18, 1970, but apparently was not effective until 1979.[3] Dornier argues that the Convention controls all "taking of evidence in this case." That argument misconstrues the purpose and effect of the Convention. By its express title, the Convention pertains to the taking of evidence abroad, not within the United States. The "rapporteur" for the commission which drafted the Convention described it as a revision of a 1954

[3] Dornier has cited no authority to the effect that the Convention is presently in force for West Germany. Sweaney has found no authoritative source confirming the effective date but notes that the German declarations accompanying ratification appear in Volume VIII of the Martindale-Hubbell Law Directory.

Hague convention dealing with letters rogatory or letters of request and the techniques for the securing of evidence abroad under civil law practice. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651 (July 1969). *See also* Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L.Q. 646 (July 1969). Those articles make it clear that the Convention was intended to simplify the manner of obtaining judicial assistance in a foreign country, primarily in obtaining oral testimony. Sweaney has never argued, as Dornier implies at page 6 of its Petition, that the Convention does not encompass document production where foreign judicial assistance is required. The issue is whether the Convention applies where a party is before the local court.

The taking of any evidence is regarded as a judicial act in civil law countries. Edwards, *supra*, at 647. Accordingly, the production of documents by nonparties within Germany would be viewed as a prerogative of the court. In that situation, the Convention governs. Where judicial assistance from a foreign tribunal is not required, however, the Convention has no applicability. Were Sweaney attempting, for example, to depose a German expert on aircraft design who would or could not come to Alaska voluntarily to be examined, the Convention would apply. Similarly, if documents were requested belonging to some other German entity or individual not a party and not within the jurisdiction of the Alaska courts, German judicial assistance would be necessary to assure production. *Cf. Coopman v. Superior Court*, 237 Cal. App. 2d 656, 47 Cal. Rptr. 131, 134-35 (1965) (party seeking production of documents at a deposition must seek the aid of Nevada courts since the documents were in the control of a Nevada corporation, not a party to the action and not within the jurisdiction of the trial court). Where acts of a judicial nature on foreign soil are not needed, the Convention does not prohibit the discovery procedures of the Alaska Rules of Civil Procedure.

The bulk of Dornier's argument raises irrelevant issues. It claims, without substantiation, that pre-trial discovery is unknown to German law and thus it will be difficult for the

corporation and attorneys to understand the process. This is simply not relevant to the question of construction of the Convention's terms. Even if it were relevant, requiring familiarity with the laws of a jurisdiction into which a corporation voluntarily injects its product is not an unreasonable burden. Moreover, any difficulties for Dornier's Alaskan counsel occasioned by the German language of the documents, as well as the necessity of translation, will exist wherever the documents are produced. The mere fact that production would be burdensome is not in itself a sufficient objection to discovery. *E.g., Alexander v. Parsons,* 75 F.R.D. 536, 539 (W.D. Mich. 1977). That burden, if it exists, would be relevant to a discretionary decision of a trial court limiting discovery. Such an issue hardly carries the constitutional implications necessary to demand this Court's attention. [4]

In the situation at hand, documents in the control of Dornier have been requested that are clearly crucial to the development of Sweaney's case. Dornier has been found to be subject to the Alaska court's personal jurisdiction based on the extent of its activities within the State of Alaska. There is no need for foreign judicial assistance to procure these documents. The rule stated in a case involving discovery of documents in the possession of a United States bank's foreign branch in Germany should control:

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[4] Dornier argues, but does not demonstrate, that it is faced with a "Hobson's choice" of complying with discovery and finding its arguments mooted on appeal, or failing to comply and subjecting itself to possible sanctions and default judgment. Petition at 10. Remedies could, however, exist and include exclusion of the evidence improperly obtained or assessment against Sweaney of the costs of production.

As to penalties it might face for failure to produce, Dornier asks this Court to indulge in sheer speculation. The sanction imposed for failure to comply with a discovery order is addressed to the discretion of the trial court. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam).

> It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person in possession or control of the material.

United States v. First National City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968). Dornier attempts to distinguish this case on the basis that the defendant therein was a large financial institution organized under the laws of the United States. That was not, however, a basis for the court's decision. The court clearly relied on its *in personam* jurisdiction (regardless of how obtained) over a defendant which had control over documents located in a foreign country. The same description applies to Dornier. It should similarly be required to produce the documents under its control.

Dornier cites no cases construing this Convention, although it has been in effect between the United States and at least some countries since 1972. Respondent Sweaney has found no cases addressing the issue here presented. The Convention has been mentioned in dicta, albeit infrequently. *E.g., Pain v. United Technologies Corp.*, 637 F.2d 775, 787-88 (D.C. Cir. 1980). At least one commentator has agreed with Sweaney's distinction between parties and nonparty witnesses. *See* Stein, *Depositions in Foreign Jurisdictions: "Innocence Abroad,"* 7 Litigation 14, 17 (Spring 1981).

This paucity of authority suggests that the issue is not a recurrent problem in relationships between the United States and other countries, and that the position of the Alaska courts will not engender the conflict of international proportions suggested by Dornier. The lack of contrary authority also suggests that the position of the Alaska court is correct.

CONCLUSION

Dornier's Petition does not come within the Court's jurisdiction because the Supreme Court of Alaska has not ruled upon the question presented. Even were the finality requirement satisfied, the Petition would still be inappropriate. It asks the court to resolve a unique question without the benefit of consideration by several lower courts furnishing a better perspective on the issue. Review is further inappropriate because there is no conflict between the Alaska court's ruling and the Hague Convention. The trial court properly refused to allow an *in personam* defendant to hide behind the provisions of an international convention applicable only to the taking of evidence in a foreign country.

For all the foregoing reasons, Respondent Sweaney respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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Statutes

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rules

United States Supreme Court Rule 28.1

.1. . . . Any document, except a joint appendix or a brief *amicus curiae*, filed by or on behalf of one or more corporations, shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation. This listing may be done as a footnote.

Alaska Rule of Appellate Procedure 402

(a) **When Available.**

(1) An aggrieved party, including the state of Alaska, may petition the appellate court as provided in Rule 403 to review

any order or decision of the trial court, not appealable under Rule 202, in any action or proceeding, civil or criminal.

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

(b) **When Granted.** Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:

(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or

(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.